

No. 23-1890

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**United States Court of Appeals for the Fourth Circuit**

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TAMER MAHMOUD, ET AL.,  
PLAINTIFFS-APPELLANTS,

v.

MONIFA B. MCKNIGHT, ET AL.,  
DEFENDANTS-APPELLEES.

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*APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND,  
NO. 23-CV-1380, HON. DEBORAH L. BOARDMAN, PRESIDING*

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**UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF PROFESSORS  
DOUGLAS LAYCOCK, RICHARD W. GARNETT, HELEN M. ALVARÉ,  
THOMAS C. BERG, AND MICHAEL W. MCCONNELL AS  
AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLANTS'  
MOTION FOR INJUNCTION PENDING APPEAL**

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Professors Douglas Laycock, Richard W. Garnett, Helen M. Alvaré, Thomas C. Berg, and Michael W. McConnell move for leave to file the attached brief as *amici curiae* in support of Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal. All parties consented to the filing of this brief.

*Amici* are constitutional law scholars whose scholarship and teaching have a particular focus on the First Amendment Free Exercise and Establishment clauses. For decades, these professors have closely studied constitutional law and religious liberty, published numerous books and scholarly articles on the topic, and addressed it in litigation. The *amici* bring to this case a deep theoretical and practical understanding of the Supreme Court's First Amendment jurisprudence.<sup>1</sup>

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law Emeritus at the University of Virginia and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas, where he served for 27 years. He is one of the nation's leading authorities on the law of religious liberty, having taught and written about the subject for more than four decades at the University of Texas, the University of Virginia, the University of Chicago, and the University of Michigan. He has testified many times before Congress and the Texas legislature and has

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

argued many religious freedom cases in the courts, including the U.S. Supreme Court. He was lead counsel for petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). His many writings on religious liberty have been republished in a five-volume collection under the overall title *Religious Liberty*.

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor at Notre Dame Law School. He teaches and writes about the freedoms of speech, association, and religion, and constitutional law more generally. He is a leading authority on the role of religious believers and beliefs in politics and society. He has published widely on these matters, and is the author of dozens of law review articles and book chapters. He is the founding director of Notre Dame Law School's Program on Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

Helen M. Alvaré is the Robert A. Levy Endowed Chair in Law and Liberty at Antonin Scalia Law School, George Mason University, where she teaches Family Law, Law and Religion, and Property Law. She publishes on matters concerning marriage, parenting, non-marital households, and the First Amendment religion clauses. She is faculty advisor to the law school's *Civil Rights Law Journal*, and the Latino/a Law Student Association, a Member of the Holy See's Dicastery for Laity, Family and Life (Vatican City), a board member of Catholic Relief Services, a

member of the Executive Committee of the AALS' Section on Law and Religion, and an ABC news consultant. She cooperates with the Permanent Observer Mission of the Holy See to the United Nations as a speaker and a delegate to various United Nations conferences concerning women and the family.

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law. He combines advocacy with scholarship as one of the nation's leading experts on religious liberty and law and religion. He is the author of six books, including a leading casebook, *Religion and the Constitution* (with Michael McConnell and Christopher Lund, Aspen Publishing), and *The State and Religion in a Nutshell* (West). He has written approximately 75 book chapters and journal articles and dozens of op-eds and shorter pieces on religious freedom, constitutional law, and the role of religion in law, politics and society. His work has been cited multiple times by the U.S. Supreme Court and federal courts of appeals. He is at work on a forthcoming book, *Religious Liberty in a Polarized Age*.

Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. From 2002 to 2009, he served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit. He was nominated by President George W. Bush, a Republican, and confirmed by a Democratic Senate by unanimous consent. McConnell has previously held chaired professorships at the

University of Chicago and the University of Utah, and visiting professorships at Harvard and NYU. He teaches courses on constitutional law, constitutional history, First Amendment, and interpretive theory. He has published widely in the fields of constitutional law and theory, especially church and state, equal protection, and separation of powers. His book, “The President Who Would Not Be King: Executive Power Under the Constitution,” was published by Princeton University Press in 2020, based on the Tanner Lectures in Human Values, which he delivered at Princeton in 2019. His latest book, co-authored with Nathan Chapman, “Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience,” was published by Oxford University Press in mid-2023. McConnell has argued sixteen cases in the United States Supreme Court, most recently *Carney v. Adams* (2020), defending a provision of the Delaware Constitution requiring political balance on that state’s courts.

The proposed brief provides relevant arguments about how the Supreme Court’s recent First Amendment precedents apply to this case. As the brief explains, the out-of-circuit authority relied on by the district court has been superseded by recent developments in free exercise jurisprudence. Thus, the brief adds pertinent arguments on issues central to the proper resolution of this case.

For these reasons, the Court should grant the motion and file the attached brief. *See, e.g., Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n,*

197 F.3d 560, 567 (1st Cir. 1999) (“[A] court is usually delighted to hear additional arguments from able amici that will help the court toward right answers.”); *Lefebure v. D’Aquila*, 15 F.4th 670, 675 (5th Cir. 2021) (“[C]ourts should welcome amicus briefs for one simple reason: ‘[I]t is for the honour of a court of justice to avoid error in their judgments.’”); *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (“[I]t is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed, the [Court], after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the [Court] will be deprived of a resource that might have been of assistance.”).

Respectfully submitted,

s/ Christopher Mills

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AUGUST 31, 2023

## **CERTIFICATE OF COMPLIANCE**

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by rule, it contains 1,400 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

Dated: August 31, 2023

/s Christopher Mills

Christopher Mills

**CERTIFICATE OF SERVICE**

I, Christopher Mills, an attorney, certify that on this day the foregoing Motion and all attachments were served electronically on all parties via CM/ECF.

Dated: August 31, 2023

s/ Christopher Mills

Christopher Mills